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ARTICLE XXVI
TOBACCO PRODUCTS

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Section 26.1. Statement & Scope

Whereas, the prevention of adolescent tobacco product use is detailed in Article 13-F of the Public Health Law of the State of New York, known as the *Adolescent Tobacco-Use Prevention Act* (ATUPA), which expressly prohibits the sale of tobacco products to minors; and

Whereas, the Commissioner of the Dutchess County Health Department has the duty to enforce the provisions of ATUPA; and

Whereas, the Dutchess County Board of Health promulgates regulations which the Commissioner also has the duty to enforce; and

Whereas, the Dutchess County Board of Health desires the Commissioner to effectively and efficiently enforce ATUPA by limiting and preventing access to tobacco products by persons under eighteen years of age, and prohibit the sale of tobacco products to said persons; and

Whereas, the number of adolescent tobacco users nationwide has recently been demonstrated statistically to be increasing in the United States as detailed in the Morbidity and Mortality Weekly Report (November 18, 1994, Vol. 43, No. SS-3) of the Centers for Disease Control and Prevention (CDC) of the U. S. Department of Health and Human Services; and

Whereas, based on the United States Surgeon General's 1994 Report, that most persons under the age of 18 who use tobacco products are addicted to nicotine and are thus compelled, to a degree, to attempt to purchase more tobacco products, participating in an illegal act; and

Whereas, tobacco products are the most heavily advertised product in the United States; and

Whereas, the three most heavily advertised tobacco products were demonstrated to have captured 86% of the teenage market but only 35% of overall sales as detailed in the CDC's August 19, 1994 Morbidity and Mortality Weekly Report; and

Whereas, there is abundant recognition of the relationship between advertising and product use, in addition to specific and convincing evidence that tobacco advertising plays a significant role in stimulating minors to solicit for the illegal sale of tobacco products to them, including:

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Davis R. "Current trends in cigarette advertising and marketing," New England Journal of Medicine. 1987;316:725-732.

Chapman S., Fitzgerald B. "Brand preference and advertising recall in adolescent smokers: some implications for health promotion," American Journal of Public Health. 1982;72:491-494.

Klintzner M, Gruenewald PJ, Bamberger E. "Cigarette advertising and adolescent experimentation with smoking," British Journal of Addiction. 1991;86:287-298.

Goldstein AO, Fischer PM, Richards JW, Cretin BA. "Relationship between high school student smoking and recognition of cigarette advertisements," Journal of Pediatrics. 1987;110:488-491.

Hunter SM, Webber LS, Berenson GS. "Cigarette smoking and tobacco usage behavior in children and adolescents: Bogalusa Heart Study," Preventive Medicine. 1980;9:701-712.

Hunter SM, Croft JB, Burke GL, Parker FC, Webber LS, Berenson GS. "Longitudinal patterns of cigarette smoking and smokeless tobacco use in youth: the Bogalusa Heart Study," American Journal of Public Health. 1986;76:193-195.

Aitken PP, Leathar DS, O'Hagan FJ, Squair SI. "Children's awareness of cigarette advertising and brand imagery," British Journal of Addiction. 1987;82:615-622.

Charlton A. "Children's advertisement awareness related to their views of smoking," Health Education Journal. 1986;45(2)75-78.

Aitken PP, Leathar DS, Squair SI. "Children's awareness of cigarette brand sponsorship of sports and games in the UK," Health Education Research. 1986;1:203-211.

Alexander HM, Calcott R, Dobson AJ, et al. "Cigarette smoking and drug use in school children, IV: factors associated with changes in smoking behavior," International Journal of Epidemiology. 1983;12:59-66.

Whereas, outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in Packer Corporation v. Utah, 285 U.S. 105 (1932); and

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Whereas, tobacco advertising on billboards undermines parental authority and school based educational programs which attempt to prevent children from using a product which is illegal to be sold to them; and

Whereas, adolescents are exposed to outdoor advertisements whenever they move about in their communities, including when they ride the school buses to and from school; and

Whereas, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980); gambling, see Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341-42 (1986); cigarettes, see Capital Broadcasting Co. v. Mitchell, 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court), aff'd per curiam,405 U.S. 1000 (1972); and alcohol, see Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (1983), cert. den., 104 S.Ct. 3533 (1984); and

Whereas, restricting the time, place and manner where tobacco products are displayed for sale and prohibiting the use of Billboard advertising are necessary and reasonable measures, to reduce the illegal sale of tobacco products to minors, to minimize theft and distribution without charge of tobacco products, and to prevent adolescent tobacco product use; and

Whereas, the New York State Court of Appeals has held in The People v. Mobil Oil Corp., 48 NY2d 192 (1979), that there may be reasonable governmental regulation of commercial speech as long as there are available alternate channels for communicating commercial information, and if such commercial speech causes a secondary detrimental effect on society, such as by promoting the distribution of tobacco products to minors by stimulating persons under 18 years of age to acquire tobacco products in contravention to the New York State Public Health Law Article 13-F; and,

Whereas, a local permit requirement is necessary to more systematically monitor compliance with ATUPA; and

Whereas, in-store monitoring measures are necessary to maximize store owner accountability and to minimize distribution of tobacco products to minors with or without charge; and

Whereas, the Dutchess County Board of Health finds and believes, after careful study and deliberation, that Dutchess County has a substantial and important interest in reducing the incidents of illegal acts relating to the sale of tobacco products to persons under the age of 18; and

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Whereas, a recent survey done by the Dutchess County Health Department revealed that over 55% of local high school students have used tobacco products, of which 57% first tried tobacco products before the age of 14 and over 92% first tried tobacco products before the age of 16; and

Whereas, alternative forms of conveying consumer information to adults, such as by newspapers and magazines, remain unaffected by this regulation; and

Whereas, the content, themes, and/or messages of tobacco product advertising are not affected by this regulation, and specifically no additional anti-smoking warnings are being mandated in contravention to the Federal Cigarette Labeling and Advertising Act (15 U.S.C.A. Section 1331 et seq.); nor is there any requirement or prohibition being imposed based on anything other than the efficient and effective enforcement of a valid state statute, i.e. ATUPA; therefore,

The Dutchess County Board of Health does hereby amend and enact the *Dutchess County Sanitary Code* as follows, herein.

Section 26.2. Definitions

(A) The term "Permit Issuing Official" shall mean the Dutchess County Commissioner of Health.

(B) Other definitions found in the New York State Tax Law Section 470 and New York State Public Health Law, Article 13-F Section 1399-aa are hereby incorporated as definitions applicable to this Article of the Dutchess County Sanitary Code.

(C) The term "Billboard" shall mean a panel used for outdoor advertising or any other outdoor advertising area larger than twenty (20) square feet, including sides of building, blimps, freestanding sideboards, banners and signs.

Section 26.3. Permit Required

(A) Every Dealer of tobacco products in Dutchess County must possess a valid Permit issued by the Dutchess County Commissioner of Health for each location at which tobacco sales occur. Private organizations including, but not necessarily limited to, clubs and fraternal organizations are exempted from this Section and all other provisions of this Article.

(B) Application for the appropriate Permit shall be made at least twenty-one (21) days before the date of proposed start of operation on a form prescribed by the Dutchess County Commissioner of Health.

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Application for the appropriate Permit as described herein shall be made by the owner/operator of the establishment to be Permitted, to the Dutchess County Department of Health on a written form and in a manner prescribed by the Department. The permit must include, but not be limited to, the applicant's name, business name, business address, business phone, and the address of the retail establishment for which the permit will be issued.

(C) Each Permit issued will expire one (1) year from the date of issuance, except as otherwise stipulated on the Permit.

(D) Application for renewal of Permit shall be made at least thirty (30) days prior to expiration of the current Permit on forms prescribed by the Dutchess County Commissioner of Health. All applications for new or renewal Permits shall be accompanied by payment of the prevailing fee.

(E) The Department may withhold, suspend, or revoke a Permit if it finds that:

1. the information submitted in the application is incorrect or incomplete; or
2. the fee for application and/or the Permit have not been paid as required; or
3. the applying Dealer of tobacco products is not in compliance with all provisions of the New York State Tax Law Article 20 and the New York State Public Health Law Article 13-F.

Section 28.4, Standards and Requirements

(A) Any Dealer of tobacco products shall comply with all provisions of the New York State Tax Law Article 20 and New York State Public Health Law Article 13-F.

(B) Any tobacco Dealer shall restrict the display of tobacco products accessible to the public, including automatic vending machines, to an area of the establishment which must be within the constant and unobstructed view, and supervision and control of the person in charge of the establishment, or his or her designated agent or employee. Furthermore, to minimize theft (i.e. distribution without charge), such display of tobacco products shall also be restricted as follows, below herein.

1. All floor, counter-top, or free-standing tobacco product displays (also known as self service displays) which are accessible by the public shall be restricted to an area within the establishment which is within a ten (10) foot radius of any of the following locations: an attended cash register; an attended check-out counter or aisle; or an attended office, and (Con't.)

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2. there shall be no access by the public to any floor, counter-top, or free-standing tobacco product displays at a height of three (3) feet or less off the floor.

3. In lieu of Section 26.4 (B), 1 and 2, any tobacco Dealer may submit a written plan to be approved by the Dutchess County Department of Health. To be approved by the Department, such a plan should be comparable in its effect to the regulations as set forth in Section 26.4 (B) 1. and 2. above, herein.

(C) Any valid Permit must be posted by the Dealer at each location where tobacco sales occur in a manner conspicuous to the public.

(D) Within Dutchess County, no Billboard shall be used or permitted to be used for the purpose of advertising or promoting the consumption, use, or sale of tobacco products.

Section 26.5. Severability

If any clause, sentence, paragraph, subdivision, section, or part of this regulation or the application thereof to any person, individual, corporation, firm, partnership, entity, or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such order or judgement shall not effect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section, or part of this regulation, or its application to the person, individual, corporation, firm, partnership, entity, or circumstance directly involved in the controversy in which such order of judgement shall be rendered.

Section 26.6. Effective Date

This regulation shall take effect no earlier than May 1, 1995.

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